No. 80-610

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD DANIEL FREEMAN, ROBERT TEMP, AND ALAINE CARTER TEMP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-610

RICHARD DANIEL FREEMAN, ROBERT TEMP, AND ALAINE CARTER TEMP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the district court's failure to inquire into an alleged conflict of interest deprived petitioners of effective assistance of counsel.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 2

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Cuyler v. *Sullivan*, No. 78-1832 May 12, 1980) 3, 4, 5

Holloway v. *Arkansas*, 435 U.S. 475 3

United States v. *Garcia*, 517 F. 2d 272 2

Constitution, statutes and rule:

United States Constitution, Sixth Amendment 4, 5

18 U.S.C. 1341 1

18 U.S.C. 2314 1

Fed. R. Crim. P. 44(c) 5

PREVIOUS PAGE WAS BLANK

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 619 F. 2d 1112.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1980. A petition for rehearing was denied on August 13, 1980. The petition for a writ of certiorari was filed on October 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of using the mail in the execution of a scheme to defraud, in violation of 18 U.S.C. 1341, and of interstate transportation of property taken by fraud, in violation of 18 U.S.C. 2314.

Petitioners Freeman and Robert Temp were sentenced to terms of eight years' imprisonment and petitioner Alaine Temp was sentenced to a term of six years' imprisonment.

1. The evidence at trial revealed that petitioners and one Walter Wilson Carter[1] devised a scheme to defraud investors by selling oil leases that neither petitioners nor Carter owned. Carter obtained and operated oil and gas properties through his partially owned corporation, Independence Drilling Corp. (IDC). Petitioners, in turn, located investors through their businesses, Diversified Monetary Systems, Inc. (DMS) and Continental Pacific Corp. (CPC). The convictions arose from the sale to 45 investors of seven leases that Carter, IDC, and CPC never owned. In connection with these leases, petitioners also charged investors workover fees, purportedly to maximize the petroleum production, although petitioners never expended money on

---

[1]Carter was indicted together with petitioners, but he pleaded guilty and testified for the government.

the properties. Petitioners also sent investors production reports on the nonowned wells, although some of the wells did not produce any oil or gas and none of the product of any of the wells accrued to the investors' benefit (Pet. App. 5-6). Petitioners presented a unified defense that they were unaware that Carter did not own the leases (Pet. 2).

2. At arraignment, petitioners were represented by a single attorney, and Carter was represented by a second attorney. In view of petitioners' joint representation, the district court inquired (XXVI Tr. 7-8) whether petitioners had reviewed and signed a waiver of conflict of interest in conformity with the Fifth Circuit's decision in *United States* v. *Garcia*, 517 F. 2d 272 (1975). The judge explained to petitioners' attorney that he " * * * just wanted to be sure now that your clients [know where they stand] so they won't be complaining about you in the event they are convicted and come in on horseback on a 2255 and say 'I should never have had one lawyer represent all three of us because he is guilty.' The other one says 'No.' The other one says, 'No, he is guilty' " (XXVI Tr. 4-5). After each petitioner averred that he had read and signed the statement, the court inquired: "Do you understand that [the statement] is for each of your protection * * * that you can't later come in and claim that he should not have tried to represent all three of you because of a conflict of interest between you that you should have each had separate lawyers because you had separate defenses? * * * And are you satisfied that even if there is a conflict of interest between your possible defenses in this case, that you nevertheless insist and ask this Court to let you be represented by the attorney of your choice, Mr. Nicholas?" (XXVI Tr. 7-8). Petitioners replied that they understood the statement and agreed to the waiver.

ARGUMENT

Petitioners contend that, even though the district court inquired into the propriety of multiple representation at arraignment, it was required to do so again after their

co-defendant, Carter, pleaded guilty and agreed to testify for the government. Petitioners contend that the guilty plea raised a potential and actual conflict of interest that was not recognized by the court at arraignment and that their waiver therefore should not be deemed to have survived Carter's change in position. Petitioners' contention is without merit.

Joint representation is not *per se* a violation of the constitutional guarantee of assistance of counsel. *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). Where no party objects to joint representation, the Sixth Amendment does not require the trial court to initiate inquiry regarding multiple representation in every case. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980), slip op. 11 (footnote omitted).

In the present case, petitioners did not object to their continued representation by a single attorney after Carter pleaded guilty and agreed to testify for the government. Nor, as the court of appeals correctly held (Pet. App. 12-13), was there anything in the circumstances of this case to indicate to the trial court that a "particular conflict exist[ed]" (*Cuyler* v. *Sullivan*, *supra*, slip op. 11) as a result of Carter's change in position such that the trial court had a duty to reinquire of petitioners respecting a possible conflict of interest. The court previously had inquired into the propriety of joint representation, and petitioners waived objections based on potential conflicts of interest after the possibility that petitioners might have inconsistent defenses was discussed. In any event, at trial, petitioners presented a unified defense that they were unaware that Carter did not own the leases; the fact that Carter testified did not change this defense or give rise to conflicting interests.

Petitioners argue (Pet. 3-4) that a conflict of interest developed because Carter's decision to testify resulted in their attorney's decision to have them testify in response. Petitioners suggest that they were deprived of the advice of independent counsel in determining whether, in fact, they should testify and that independent counsel could have cross-examined any one of them who did testify more freely than joint counsel chose to do. Similarly, petitioners suggest that independent counsel could have cross-examined Carter more fully, emphasizing the participation of certain petitioners and de-emphasizing the participation of his own client. Even now, however, petitioners have failed to identify how any one of them was prejudiced by taking the stand, whether or why independent counsel might have advised them differently, or in what manner either they or Carter could or would have been cross-examined more effectively by independent counsel.[2] Conclusory allegations that witnesses might have been cross-examined more effectively or that a defendant either would or would not have testified if represented by separate counsel could be made in every case of joint representation and cannot, without more, result in reversal of a conviction on the basis of ineffective assistance of counsel. A more specific demonstration of how "an actual conflict of interest adversely affected [the] lawyer's performance" (*Cuyler* v. *Sullivan*, *supra*, slip op. 13) is required.

For similar reasons, the decision by Carter to plead guilty and testify for the government cannot be thought to have triggered a Sixth Amendment duty on the part of the district court, prior to trial, to inquire once again regarding a possible conflict of interest. To be sure, the district court might have had reason to believe that the government's case was strengthened by this turn of events. But the court had

---

[2]We note that petitioners have chosen to be represented by common counsel in this Court.

no reason to believe that Carter's action would affect petitioners' defense or their relationship to one another—especially since even now, after trial, petitioners have failed to demonstrate that it did.

The Sixth Amendment to one side, petitioners argue (Pet. 6-12) that review of this case is appropriate to consider (1) when the district courts should be required, in the exercise of this Court's supervisory powers, to inquire regarding possible conflicts of interest resulting from joint representation; and (2) the consequences of a failure so to inquire. But Fed. R. Crim. P. 44(c), which became effective December 1, 1980, now requires district courts to inquire in *all* cases of joint representation. Accordingly, the asserted conflict among the courts of appeals respecting the exercise of their supervisory powers to accomplish the same result (see Pet. 6-9) is no longer of any importance.

The consequences of a failure to comply with the duties imposed by Rule 44(c)—*e.g.*, whether, as a result, the burden shifts to the government to prove that an actual conflict of interest did not affect the lawyer's performance (Pet. 8-10)[3]—should be considered in a case that actually was governed by Rule 44(c). This is not such a case, because petitioners were tried and their convictions were affirmed before that rule went into effect. In any event, as described above, the district court in this case did inquire at arraignment into the possibility of a conflict of interest, and it had no occasion to reopen the issue at a later date. Therefore, it does not appear that Rule 44(c) would have been violated even if it did apply in this case.

---

[3]Under the Sixth Amendment, of course, the burden is on the defendant to show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler* v. *Sullivan*, *supra*, slip op. 13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

JANUARY 1981

DOJ-1981-01